Tan Boon Kean v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-64 OF 1993
MOHAMED AZMI, WAN YAHYA FCJJ AND ZAKARIA YATIM JCA
9 NOVEMBER 1995

Criminal Procedure *— Close of prosecution's case — Duty of court — Whether must undertake maximum evaluation of evidence — Whether maximum evaluation for purpose of establishing prima facie case or beyond reasonable doubt case — Meaning of 'case' required to be made out under s 180 — Criminal Procedure Code (FMS Cap 6) s 180*

Criminal Procedure *— Trial — Prima facie case — Standard of proof required to establish prima facie case — What constitutes credible evidence — Whether every ingredient of charge must be proved — Criminal Procedure Code (FMS Cap 6) s 180*

Criminal Procedure *— Trial — Verdict — Whether should be made at close of prosecution's case — Whether question of guilt of accused should be postponed to conclusion of trial — Criminal Procedure Code (FMS Cap 6) s 180*

Criminal Law *— Dangerous Drugs Act 1952 (Malaysia) — Section 37B — Trafficking in dangerous drugs — Statutory presumption of trafficking under s 37(da) — Failure of judge to consider whether presumption rebutted on balance of probabilities — Whether charge must be reduced to possession under s 12 — Dangerous Drugs Act 1952 ss 12, 37(da) & 39B*

The appellant was called to enter his defence on a charge of trafficking in 25.84g of heroin, an offence under s 39B Dangerous Drugs Act 1952 ('the Act'), and at the end of the trial he was found guilty and sentenced to death. The prosecution evidence disclosed that in a raid conducted by the police, two packages containing 13 packets of substance were found in a room occupied by the appellant. This substance was later analysed to be heroin as defined in the Act. The facts showed that the appellant had the care and management of the room, giving rise to the presumption under s 37(b) of the Act that he should be deemed to be the occupier of the room and, therefore, under s 37(g) should be presumed to have knowledge of the drugs concealed there. Further, as he was clearly in custody or control of the heroin, he should be deemed to be in possession of the dangerous drugs by virtue of s 37(d). The weight of the heroin being more than 15g also attracted the presumption of trafficking under s 37(da) of the Act. The judicial commissioner had called for the appellant to enter his defence at the close of the case for the prosecution as there was sufficient evidence adduced by the prosecution for the defence to be called and the evidence given was credible. The appellant appealed against his conviction and sentence, on the grounds, inter alia, that the judicial commissioner had: (i) failed to undertake a maximum evaluation of the evidence at the close of the prosecution case to determine whether the case against the appellant had been proved beyond reasonable doubt; and (ii) erred in law in not applying s 180

of the Criminal Procedure Code (FMS Cap 6) ('the Code') and the ratio decidendi in *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 when calling on the appellant to enter his defence.

Held, allowing the appeal:

(1) The 'case' required to be established by the prosecution under s 180 is a 'prima facie' case and not a 'beyond reasonable doubt' case. If the case required to be established by the prosecution under s 180 is a 'beyond reasonable doubt case', then the words 'if unrebutted' and 'would warrant his conviction' in s 180, would become meaningless and redundant. In the court's view, there was no definitive ruling in *Khoo Hi Chiang* that the word 'case' in s 180 is not a prima facie case.

(2) In order to prove a prima facie case, the prosecution evidence must be capable of belief, and only beyond reasonable doubt evidence can constitute credible evidence. Under s 180, a prima facie case is one where every essential ingredient of the charge is established by sufficient, beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

(3) The court was only bound by the ratio in *Khoo Hi Chiang* that at the close of the prosecution case, the duty of the court is to carry out a maximum evaluation of the evidence. The pronouncement in *Khoo Hi Chiang* on the purpose of the maximum evaluation test was mere obiter dicta. In any event, the court was of the view that in *Khoo Hi Chiang*, in stating the need for maximum evaluation of the evidence at the close of the prosecution case, the Supreme Court was only dealing with the establishment of the 'charge' and not the 'case'. Thus, the object of the maximum evaluation exercise is to determine whether the prosecution has established a prima facie case under s 180 of the Code.

(4) The question whether an accused ought to be found guilty and convicted must be postponed until the conclusion of the trial as there is clearly no legal requirement for the court to decide on the guilt of the accused at the close of the prosecution case. Under our adversarial system of criminal justice, it would be intolerable if the trial court were required to find the accused actually guilty beyond reasonable doubt twice, once at the close of prosecution case and again at the conclusion of the trial, before there can be a conviction.

(5) The judicial commissioner had, in accordance with s 180, correctly applied the prima facie case test when he held that there was sufficient evidence for him to call the defence. On the evidence before him, there was clearly a prima facie case to answer.

(6) However, the judicial commissioner had not sufficiently directed his mind as to whether the appellant had rebutted the presumption of trafficking under s 37(da) of the Act on the balance of

probabilities. Furthermore, the prosecution had conceded that the appellant ought to be convicted of possession under s 12 and not trafficking. The conviction was accordingly reduced from trafficking to possession of drugs.

[Bahasa Malaysia summary

Perayu diarahkan untuk memasukkan pembelaan beliau atas tuduhan mengedar 25.48g heroin, suatu kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta itu'), dan pada akhir perbicaraan, beliau didapati bersalah dan dijatuhkan hukuman mati. Keterangan pihak pendakwaan menunjukkan bahawa semasa satu serbuan yang dibuat oleh polis, dua bungkusan yang mengandungi 13 paket sesuatu bahan telah dijumpai di dalam bilik yang diduduki oleh perayu. Setelah dianalisa, bahan itu didapati adalah heroin seperti yang ditakrifkan di dalam Akta itu. Fakta-fakta kes ini menunjukkan bahawa perayu mempunyai jagaan dan pengurusan bilik itu, yang menimbulkan anggapan di bawah s 37(b) Akta itu bahawa beliau hendaklah disifatkan sebagai penduduk bilik itu dan, dengan itu, di bawah s 37(g) hendaklah dianggap mempunyai pengetahuan tentang dadah yang disembunyikan di sana. Juga, oleh kerana beliau jelas mempunyai jagaan atau pengawalan heroin itu, beliau harus dianggap memiliki dadah berbahaya itu di bawah s 37(d). Berat heroin yang melebihi 15g juga membawa kepada anggapan mengedar di bawah s 37(da) Akta itu. Pesuruhjaya kehakiman telah memanggil perayu memasukkan pembelaan beliau di penutup kes pihak pendakwaan kerana terdapat keterangan yang mencukupi yang dikemukakan oleh pihak pendakwaan untuk pembelaan dipanggil dan keterangan yang diberi itu boleh dipercayai. Perayu telah membuat rayuan terhadap sabitan dan hukumannya, atas alasan, antara lain, bahawa pesuruhjaya kehakiman: (i) gagal membuat penilaian maksimum atas keterangan pada penutup kes pihak pendakwaan untuk menentukan sama ada kes terhadap perayu telah dibuktikan sehingga melampaui keraguan munasabah; dan (ii) membuat kesilapan di sisi undang-undang kerana tidak memakai s 180 Kanun Acara Jenayah (NMB Bab 6) ('Kanun itu') dan tidak mengikut ratio decidendi dalam *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 apabila memanggil supaya perayu memasukkan pembelaannya.

Diputuskan, membenarkan rayuan itu:

(1) 'Kes' yang perlu dibuktikan oleh pihak pendakwaan di bawah s 180 adalah suatu kes 'prima facie' dan bukannya suatu kes 'melampaui keraguan munasabah'. Jika kes yang perlu dibuktikan oleh pihak pendakwaan di bawah s 180 adalah suatu kes 'melampaui keraguan munasabah', maka perkataan 'jika tidak dipatahkan' dan 'akan mewajarkan sabitan tertuduh' di dalam s 180 akan menjadi tidak bermakna dan tidak perlu. Mengikut pendapat mahkamah, tidak terdapat suatu keputusan muktamad di dalam *Khoo Hi Chiang* bahawa perkataan 'kes' di dalam s 180 tidak bermakna satu kes prima facie.

(2) Untuk membuktikan suatu kes prima facie, keterangan pihak pendakwaan mesti boleh dipercayai, dan hanya keterangan yang melampaui keraguan munasabah boleh membentuk keterangan yang boleh dipercayai. Di bawah s 180, suatu kes prima facie adalah kes di mana setiap unsur penting tuduhan itu dibuktikan oleh keterangan yang mencukupi dan melampaui keraguan munasabah dan yang hanya boleh digulingkan dengan mematahkan keterangan yang dikemukakan oleh pihak yang bertentangan, supaya keraguan munasabah ditimbulkan terhadap kes pihak pendakwaan berkenaan dengan kebersalahan tertuduh.

(3) Mahkamah hanya terikat oleh ratio di dalam kes *Khoo Hi Chiang* bahawa di penutup kes pihak pendakwaan, kewajipan mahkamah ialah untuk menjalankan penilaian maksimum atas keterangan kes itu. Keputusan di dalam *Khoo Hi Chiang* tentang tujuan ujian penilaian maksimum hanya obiter dicta. Walau bagaimanapun, mahkamah berpendapat bahawa di dalam *Khoo Hi Chiang*, apabila menyatakan keperluan untuk menjalankan penilaian maksimum atas keterangan di penutup kes pihak pendakwaan, Mahkamah Agung hanya membicarakan tentang pembuktian 'tuduhan' dan bukannya 'kes' itu. Dengan demikian, tujuan usaha penilaian maksimum ialah untuk menentukan sama ada pihak pendakwaan telah membuktikan suatu kes prima facie di bawah s 180 Kanun itu.

(4) Soalan sama ada seseorang tertuduh harus didapati bersalah dan disabit mesti ditangguhkan sehingga penyelesaian perbicaraan kerana jelas tiada keperluan di sisi undang-undang untuk mahkamah memutuskan kebersalahan tertuduh pada penutup kes pihak pendakwaan. Mengikut sistem keadilan jenayah kita yang bersifat pertentangan, hakikat bahawa mahkamah perbicaraan perlu membuat keputusan bahawa tertuduh sebenarnya bersalah sehingga melampaui keraguan munasabah dua kali, sekali pada penutup kes pihak pendakwaan dan sekali lagi pada penyelesaian perbicaraan, sebelum boleh terdapat suatu sabitan, tidak boleh diterima.

(5) Pesuruhjaya kehakiman telah, mengikut s 180, dengan betul menggunakan ujian prima facie apabila beliau memutuskan bahawa terdapat keterangan yang mencukupi untuk beliau memanggil supaya pembelaan dibuat. Atas keterangan di hadapan beliau, jelas terdapat suatu kes prima facie untuk dijawab.

(6) Walau bagaimanapun, pesuruhjaya kehakiman tidak cukup menumpukan fikiran beliau kepada soalan sama ada perayu telah berjaya mematahkan anggapan mengedar di bawah s 37(da) Akta itu atas imbangan kebarangkalian. Lebih-lebih lagi, pihak pendakwaan telahpun mengaku bahawa perayu harus disabitkan atas tuduhan pemilikan di bawah s 12 dan bukannya atas tuduhan mengedar. Maka, sabitan dikurangkan daripada mengedar kepada pemilikan dadah.]

Notes

For cases on the close of the prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2899–2915.

For cases on prima facie case, see 5 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 3078–3087.

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) paras 26–108; [1989] Mallal's Digest 593–621; [1990] Mallal's Digest 462–467; [1991] Mallal's Digest 820–849; [1992] Mallal's Digest 656–672; [1993] Mallal's Digest 526–538; [1994] Mallal's Digest 849–870.

Cases referred to

Gan Soo Swee & Anor v Ramoo [1969] 1 MLJ 59 (refd)
Haw Tua Tau v PP [1981] 2 MLJ 49 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (distd)
Kumaraguru & Ors v PP [1994] 1 MLJ 254 (refd)
Magor & St Mellons Rural District Council v Newport Borough Council [1952] AC 189; [1951] 2 All ER 839 (refd)
Mah Kok Cheong v R [1953] MLJ 46 (folld)
May v O'Sullivan (1955) 92 CLR 654 (refd)
Miller v Ministry of Pensions [1947] 2 All ER 372 (refd)
Mohamed Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Mohamed Yatin bin Abu Bakar v PP [1950] MLJ 57 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
Ng Theng Shuang v PP [1995] 2 SLR 36 (distd)
PP v Chin Yoke [1940] MLJ 47 (folld)
PP v Goo Kian [1939] MLJ 291 (refd)
PP v Lee Pak [1937] MLJ 265 (folld)
PP v Lee Yee Heng [1938] MLJ 117 (folld)
PP v Lim Teong Seng & Ors [1946] MLJ 108 (folld)
PP v R Balasubramaniam [1948] MLJ 119 (folld)
PP v Saimin & Ors [1971] 2 MLJ 16 (folld)
Wong Yiap Long & Anor v PP [1955] MLJ 132 (refd)

Legislation referred to

Betting Ordinance 1953
Criminal Procedure Code (FMS Cap 6) ss 173(f), 180, 190, 214(i)
Dangerous Drugs Act 1952 ss 12, 37(b), (d), (da), (g), 39A, 39B
Motor Vehicles Enactment (Cap 168) s 45(iv)
Opium and Chandu Enactment (Cap 134)
Penal Code (FMS Cap 45) s 477
Road Traffic Enactment 1937
Criminal Procedure Code (Cap 132, 1955 Ed) [Sing]

Appeal from: Criminal Trial No 47(58)–5–88 (High Court, Penang)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Stanley Clement Augustin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Mohamed Azmi FCJ (delivering the judgment of the court): The appellant was called to enter his defence on a charge of trafficking in 25.84g of heroin, an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act'), and at the end of the trial he was found guilty and sentenced to death on the following amended charge:

> Bahawa kamu pada 21 Oktober 1985 jam lebih kurang 9.45 malam di sebuah bilik di dalam sebuah rumah No 4, Jalan Siam, Georgetown dalam daerah Georgetown dalam Negeri Pulau Pinang telah mengedar dadah merbahaya iaitu 25.84g heroin dan oleh itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s 39B(2) Akta yang sama.

He has appealed to this court against his conviction and the death sentence, and advanced 14 grounds in his petition of appeal against the decision of the learned judicial commissioner, Yaacob Ismail JC, given in the High Court at Penang on 7 August 1993.

The prosecution evidence in the court below disclosed that on the date in question, a party of five police personnel led by Insp Arumugam (PW5) raided a house at No 4, Jalan Siam, Penang at about 9.45pm on 21 October 1985. During the house search, the appellant was seen opening the door of a room from inside and quickly withdrew and closed the door the moment Insp Arumugam identified himself as a police officer. With the help of Det Sgt Basiron (PW6), the inspector managed to push his way in and found the appellant alone in a small room. There was no bed in the room, but on the floor there was a pillow. During the ensuing search of the room, the inspector recovered from under the pillow two packages wrapped in Chinese newspapers containing a total of 13 packets of substance which were later analysed by Mr Ng Hock Sing, the government chemist (PW1) and found to be heroin as defined in the Act. On recovery of the two packages, the appellant was arrested. Apart from the heroin, the police raiding party also seized from the room a forged NRIC with the name of one Lim Beng Cheng but bearing the appellant's photograph, together with other exhibits relating to counterfeiting activities.

The prosecution adduced evidence which disclosed that at the material time the small room was rented by one Chew Kok Seah (PW16) to the appellant. He was staying there alone and had the key to the room, and was acting in such manner during the police raid as to show that he was in possession of the dangerous drugs when considered together with the presumption of knowledge under s 37(g) of the Act. He had the care and management of the room to invoke the presumption under s 37(b) that he should be deemed to be the occupier of the room and, therefore, under s 37(g) should be presumed to have knowledge of the drugs concealed under the pillow. Alternatively, as the room was quite small, and since he was staying there by himself, he was clearly at the material time in custody or control of the packages which contained the heroin, so that he should be deemed to be in possession of the dangerous drugs by virtue of s 37(d).

The weight of the heroin being more than 15g would also attract the presumption of trafficking under s 37(da) of the Act.

In calling for the appellant to enter his defence, the learned judicial commissioner gave the following reasons in his grounds of judgment:

> At the close of the case for the prosecution the court held there was *sufficient evidence adduced by the prosecution for the defence to be called.*
>
> The accused was found in the room alone and the drugs were found under a pillow inside the room. There were no other persons in the room. Also, the accused was the sole tenant and occupier of the room. This fact was stated by SP16, the chief tenant of house No 4, Jalan Siam, Penang.
>
> Through the evidence of the chemist (SP1), it was proved that the drugs found, that is, P2 and P3, were heroin as defined under the Dangerous Drugs Act 1952. *The evidence given by witnesses for the prosecution was credible. Following the principles in Haw Tua Tau v PP [1981] 2 MLJ 49 and Ragunathan v PP [1982] 1 MLJ 139, I called for the defence.* (Emphasis added.)

The lengthy judgment of the Privy Council in *Haw Tua Tau v PP* [1981] 2 MLJ 49 lays down a number of legal principles. The learned judicial commissioner did not specify which particular principle or principles he was referring to but Mr Karpal Singh, counsel for the appellant, argues that the above reasoning of the learned judicial commissioner is wrong in law for the reasons given in the first and second grounds in his petition of appeal:

> (1) The learned trial judge was wrong in law in concluding, 'Following the principles in *Haw Tua Tau v PP* [1981] 2 MLJ 49 and *Ragunathan v PP* [1982] 1 MLJ 139, I called for the defence';
>
> (2) the learned trial judge was wrong in law in not concluding it was the duty of the prosecution at the close of its case to undertake a maximum evaluation of the evidence led by the prosecution to determine whether or not the prosecution had established the charge against the appellant beyond all reasonable doubt;

Mr Karpal Singh's major complaint is, therefore, against the alleged failure of the learned judicial commissioner to direct his mind to the need to undertake a maximum evaluation of the evidence and to the object of such exercise before calling for the appellant to enter his defence as envisaged by the Supreme Court in *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265. To determine this appeal, we are obliged to consider whether the learned judicial commissioner has erred in law in not applying s 180 of the Criminal Procedure Code (FMS Cap 6) ('the Code') and the ratio decidendi in *Khoo Hi Chiang* when deciding to call for the appellant's defence, so as to render his conviction unsustainable in law. In the difficult task of interpreting s 180, we are of course strictly guided by the principle of stare decisis.

In the alternative, Mr Karpal Singh urges this court to reduce the conviction from trafficking to one of possession, having regard to the evidence before the court. We must stress at this stage that if the statutory test imposed by s 180 of the Code had been wrongly applied by the learned judicial commissioner in calling for the appellant to enter his defence, then

A the conviction would certainly be wrong in law irrespective of whether the conviction is for trafficking or for mere possession of dangerous drugs under the Act.

As both parties needed time to consider the ratio decidendi in *Khoo Hi Chiang*, this appeal which was partly heard in Penang was adjourned to B Kuala Lumpur. Both parties were given time to put in their further written submissions, particularly on the legal effect (if any) of *Khoo Hi Chiang*, on the interpretation of s 180 in respect of criminal trials by a single judge, and in particular whether the object and purpose of the maximum evaluation principle enunciated in *Khoo Hi Chiang* is for the establishment by the prosecution of a prima facie case or a beyond reasonable doubt case.

C Section 180 of the Code provides:

> When *the case* for the prosecution is concluded the Court, if it finds that *no case* against the accused has been made out *which if unrebutted would warrant his conviction* shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence. (Emphasis added.)

D There is no dispute that this section is essentially the same as s 173(f) of the Code relating to trials before a magistrate, but somewhat different from the provision of s 214(i) in respect of jury trials which has recently been abolished:

E > When *the case* for the prosecution is concluded the Court, if it considers *that there is no evidence that the accused committed the offence*, shall direct the jury to return a verdict of not guilty. (Emphasis added.)

It is clear from the words used by the legislature that s 214(i) deals with evidence and a situation where there is no evidence before the jury that the accused committed the offence; whereas s 180 deals with 'case for the F prosecution' and 'no case against the accused'. It is, therefore, necessary to consider what is the nature of the 'case' required to be established by the prosecution as distinguished from the nature of the evidence, before a decision is made to call for the defence.

In his submission on the maximum evaluation principle in relation to G prima facie evidence and prima facie case required to be established under s 180, Mr Karpal Singh refers to us the case of *PP v Chin Yoke* [1940] MLJ 47 at p 48, which made the following important pronouncement:

> This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the magistrate or judge must necessarily H accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's convictions. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him. If, however, on the other hand, after I weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no prima facie case has been made out and the accused should not be called on for his defence.

Mr Karpal Singh requests this court to note the importance of the phrase '*which if unrebutted would warrant his conviction*' in both ss 180 and 173(f).

'Maximum evaluation' cannot mean requiring 100% proof, ie absolute certainty. He refers to the principle enunciated in *Miller v Ministry of Pensions* [1947] 2 All ER 372 at p 373 which he says should be adopted, viz:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice.

The learned counsel then referred to us the case of *Kumaraguru & Ors v PP* [1994] 1 MLJ 254 at p 264, in which Vincent Ng JC held:

> Logically, the rationale employed in deciding to call the accused to enter upon his defence, which is based on asking certain hypothetical questions, could not be the same rationale for the conviction of the accused, in our system of justice which permits one and only one standard of proof for conviction; and that is that each and every essential element of the offence has to be proved beyond reasonable doubt.
>
> Even then, it is this court's view that the expression 'if unrebutted' would seem to confine the application of the lower 'prima facie' test at the close of the prosecution's case, to only the rebuttable (essential) elements of the charge. Whereas, in respect of certain essential elements of the charge which are not of the rebuttable type, eg the identity of the offending exhibits, the prosecution would have to establish such irrebuttable elements upon a higher beyond reasonable doubt test in order for the defence to be called.

On the interpretation of s 180 of the Code, Mr Karpal Singh also refers to us the following judgment of the High Court of Australia in *May v O'Sullivan* (1955) 92 CLR 654 at p 658 which in our view is of considerable assistance, although that country has only common law and no similar statutory provision for acquittal at the close of the prosecution where there is no case to answer:

> When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', *the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted.* This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact. In deciding this question it may in some cases be legitimate, as is pointed out in *Wilson v Buttery* [1926] SASR 150 for it to take into account the fact that the defendant has not given evidence as a consideration making the inference of guilt from the evidence for the prosecution less unsafe than it might otherwise possibly appear; cf *Morgan v Babcock & Wilcox* (1929) 43 CLR 163; per Issacs J [1926] SASR 150 at

A pp 153–154. But to say this is a very different thing from saying that the onus of proof shifts. A magistrate who has decided that there is a 'case to answer' may quite consistently, if no evidence is called for the defendant, refuse to convict on the evidence for the prosecution. The prosecution may have made a 'prime facie case', but it does not follow that in the absence of a 'satisfactory answer' the defendant should be convicted. (Emphasis added.)

B On standard of proof, we are referred to *Mohamed Yatin bin Abu Bakar v PP* [1950] MLJ 57 at p 58 which Mr Karpal Singh says ought to be read in the light of the principle enunciated in *Mohamed Radhi bin Yaakob v PP* [1991] 3 MLJ 169 at p 171:

C In this country, at the close of the case for the prosecution the court will not call upon the accused for his defence unless the evidence of the prosecution witnesses is, in the first instance, believed.

From the written submissions of Mr Karpal Singh, it is clear that we have to deal with two separate and distinct issues; first, on the question of evidence with regard to the requirement of 'maximum evaluation' — the D phrase used and enunciated in *Khoo Hi Chiang*; and second, on the question of law with regard to the requirement of making out a case against the accused under s 180. The first is essentially an issue on evidence, and the second is an issue of law on the statutory burden placed on the prosecution before the defence of the accused could be called, as E distinguished from the general burden of proof beyond reasonable doubt of the guilt of the accused.

In his written reply, Mr Stanley Augustin, the deputy public prosecutor is in total agreement with Mr Karpal Singh's submission that maximum evaluation as enunciated in *Khoo Hi Chiang* cannot mean requirement of 100% proof, ie absolute certainty at the close of the case for the prosecution. F He emphasized that 'nowhere in the judgment has Edgar Joseph Jr FCJ equated maximum evaluation as requiring 100% proof, ie absolute certainty'. The learned deputy public prosecutor appears to understand the distinction between an accused '*could be found guilty*' and one that '*ought to be found guilty*' when he states:

G Maximum evaluation must mean that the court has to give maximum consideration to the prosecution evidence to decide whether the evidence adduced thus far *is sufficient upon which the accused can be found guilty* if the evidence of the prosecution has not been rebutted by the defence. (Emphasis added.)

H The learned deputy would seem to support the proposition that the object of the maximum evaluation of the evidence at the close of case for the prosecution is to decide whether the accused 'could' and not 'ought' to be found guilty — a proposition approved in *May v O'Sullivan*.

However, in his final written submission, the learned deputy public I prosecutor makes the following startling submission on the interpretation of s 180, particularly on the proposition without authority that a higher standard of proof is placed on the prosecution in trials of cases without jury (eg theft) as compared to trials with a jury (eg murder):

It is respectfully submitted that the words '*if unrebutted*' in s 180 of the Criminal Procedure Code are governed by the words '*would warrant a*

conviction'. It gives meaning to what the consequence would be if the evidence of prosecution is not rebutted. The Singapore Court of Appeal in the case of *Ng Theng Shuang v PP* [1995] 2 SLR 36 passed over the words '*would warrant a conviction*'.

In the case of *Haw Tua Tau v PP* [1981] 2 MLJ 49, the Privy Council referred in extenso to a jury trial but such reference by the Privy Council was not appropriate as it was not a trial by jury (see p 49 col 2C–D). Yang Arif and Yang Arif are respectfully invited to contrast the wording in s 180, trial by a judge sitting alone, and the previous s 214(iii) in respect of trial by judge and jury. For ease of reference both sections are reproduced hereunder:

Section 180:	When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.
Section 214(iii):	The jury may return a verdict of not guilty either unanimously or by a majority at any time after the conclusion of the evidence for the prosecution if they consider the case to be one in which they could not safely convict.

The difference here is that in a trial by jury the jury can acquit at the end of the prosecution case if the jury cannot safely convict on the evidence adduced which is the '*Haw Tua Tau*' test. Evidence which is inherently incredible is to be treated on the same footing where there is insufficient evidence to find the person on arraignment guilty.

In a non-jury trial, the court can acquit '*if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction*'. The standard of proof in a non-jury trial on the prosecution it seems for all intents and purposes is a higher one than that for a trial by a jury before the abolition of trial by jury. From the foregoing, it is respectfully submitted that the legislature must have intended that a higher standard of proof is placed on the prosecution in trials of criminal cases without jury as compared with that to trial with a jury.

It is respectfully submitted that the case of *Ng Theng Shuang v PP* is not applicable to cases in our courts.

There is obviously a distinction between s 180 and s 214, but what is relevant here is to consider the nature or type of '*case*' referred to in s 180 '*which if unrebutted would warrant his conviction*'. The words '*if unrebutted*' are particularly critical in conjunction with the word '*would*' for the purpose of determining the nature of the case to be made out by the prosecution at that stage of the trial. Successive judicial pronouncements including the cases cited by Mr Karpal Singh (*PP v Chin Yoke*, *Kumaraguru & Ors v PP*, etc) have consistently ruled that the '*case*' is a prima facie case. Neither Mr Karpal Singh nor Mr Stanley Augustin has shown us any authority that the prima facie test in s 180 has been abandoned by any definitive or fully considered ruling. Indeed, the case of *Ng Theng Shuang v PP* [1995] 2 SLR 36 clearly suggests that notwithstanding the amendments to the Singapore Criminal Procedure Code (Cap 132, 1955 Ed), the words 'if rebutted would warrant his conviction' could only connote a prima facie case and not a beyond reasonable doubt case.

We had to stress once again that since the two provisions — s 180 and s 173(f) of the Code — are essentially the same, we need only refer to s 180, which is the provision we are directly concerned with. For the purpose of dispelling any doubt, we need to stress also that we are bound by the ratio in *Khoo Hi Chiang* that the duty of the court, at the close of the case for the prosecution, is to undertake a maximum evaluation of the evidence. What remains to be determined after *Khoo Hi Chiang* is whether the object of the maximum evaluation exercise is for the prosecution to establish a beyond reasonable doubt case or a prima facie case under s 180.

On interpretation of statutes, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. (See *Magor & St Mellons Rural District Council v Newport Borough Council* [1952] AC 189 at p 191; [1951] 2 All ER 839 at p 842.) The court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies. On the available authorities which we are able to discover, in addition to the cases cited by both counsel, there can be no ambiguity that the '*case*' required to be established by the prosecution under s 180 is a '*prima facie case*' and not a '*beyond reasonable doubt case*'. Thus, in *PP v Lee Pak* [1937] MLJ 265 at p 267, the magistrate acquitted the accused on a charge under s 45(iv) of the Motor Vehicles Enactment (Cap 168) without being called upon to make his defence. In allowing the appeal of the public prosecutor, Whitley Ag CJ after reviewing the evidence held:

> I was accordingly of the opinion that the prosecution had made out a prima facie case, that the defence should have been called upon, and that the case must go back for retrial.
>
> As this was the third case which came before me on the same day in which the public prosecutor successfully appealed against an acquittal on the ground that the magistrate ought to have called upon the defence, and did not, I think it desirable to draw attention to s 173(f) of the Criminal Procedure Code which provides that:
>
> > 'If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal.'
>
> In each of these three appeals it was clear from the record that a case had been made out, which if unrebutted would have warranted a conviction. It is not necessary or desirable that I should indicate whether in my opinion the cases were strong or weak ones, but each of them certainly called for an answer.
>
> ...
>
> In Selangor Criminal Appeal No 68 of 1937 the accused was charged with failing to keep his premises in such a state as not to be a nuisance contrary to Sanitary Board By-law 33(a) Pt III, an offence punishable under s 17(ii) of the Sanitary Boards Enactment (Cap 137). Under that by-law the person liable is the occupier of the premises. Occupier is defined in the Enactment as meaning, inter alia, the person having the charge, management or control of the premises. The evidence showed that the accused was the

> principal tenant of the house. He told the Inspector that he sub-let the first floor on the passageway of which the rubbish had accumulated, but there was no evidence that that was so. The magistrate held that it followed from this statement by the accused that he was not the occupier of the first floor, and acquitted him without calling upon him for his defence. In so holding, the magistrate misdirected himself. The prosecution having proved that the accused was the tenant of the whole house, prima facie he was the occupier and had control. It was for him to show that in some way or other he had no control or had parted with control. He could not show this without giving evidence and he should have been called upon. Rather than be put to the trouble of a retrial he asked me to take further evidence and dispose of the case myself. I did so and it became clear that he had only sublet the rooms on the first floor and retained control over the passage which was the only means of access for persons approaching the second floor. I accordingly convicted him of a technical offence. Magistrates should bear in mind that in order to entitle them to call upon the defence it is not necessary that the prosecution should have made out an unanswerable case. It is sufficient if they have made out a prima facie case which calls for an answer, and which it is necessary for the accused to rebut.

The words '*if unrebutted*' and '*would*' in s 180 of the Code have consistently been interpreted by our courts as imposing on the prosecution to establish a '*prima facie case*', before the court is lawfully entitled to call for the accused to enter on his defence. If the prosecution fails to establish a prima facie case based on a thorough evaluation of the prosecution evidence as tested in cross-examination, then the accused is entitled to an acquittal at that stage of the trial. In an adversarial system of justice such as ours, the final decision on whether the accused is beyond reasonable doubt guilty of the offence with which he is charged, must remain an open question until the end of the trial. But by virtue of s 180, the accused is entitled to an acquittal at the close of the prosecution case in the absence of a prime facie case being established.

Lee Pak's case was followed in *PP v Lee Yee Heng* [1938] MLJ 117 which involved a charge for the abetment of chandu under the Opium and Chandu Enactment (Cap 134). Counsel for the accused submitted at the close of case for the prosecution that there was no case to meet under s 173(f) of the Code. The learned magistrate disagreed and called upon the defence. The accused elected to remain silent, whereupon the magistrate acquitted him. On appeal by the public prosecutor, the order was reversed, and in doing so Cussen J said at p 118:

> ... I would like to state that it is wrong and contrary to the provisions of the Criminal Procedure Code for a magistrate, if at the close of the prosecution case he in fact considers that only a highly suspicious case has been made out against the accused, to proceed to call upon the defence in the possible hope that the defence, if one is made, may resolve his doubts.
>
> Without examining in detail the evidence given for the prosecution in this case I have no doubt whatever that this was a case which strongly warranted a conviction if unrebutted and that the accused should have been convicted.

In our view, *Lee Yee Heng* laid down the important principle that in order to prove a prima facie case, the prosecution evidence must be capable of

belief, and only beyond reasonable doubt evidence can constitute credible evidence (see also *Mohamed Yatin*'s case and *Mohamed Radhi*'s case).

The most quoted decision on the '*prima facie case*' requirement of s 180 is that of Gordon-Smith Ag JA in *PP v Chin Yoke* [1940] MLJ 47. In that case, the magistrate acquitted and discharged the respondent without being called upon to enter his defence on two charges under the Road Traffic Enactment 1937. The Public Prosecutor appealed on the ground that the learned magistrate in coming to the conclusion that a prima facie case had not been made out against the respondent, was against the weight of evidence. In allowing the appeal, Gordon-Smith Ag JA had this to say at p 48:

> The second point is as to when a magistrate is justified in acting under s 173(f) of the Criminal Procedure Code. This paragraph reads as follows:
>
> > 'If, upon taking all the evidence hereinbefore referred to (ie the evidence for the prosecution), the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction, the court shall record an order of acquittal.'
>
> Similar provision is also made by s 180, in the case of a trial by a judge without assessors, by s 190 in the case of a trial by a judge with assessors and by s 214 in the case of a trial by jury. There is, however, a distinction to be drawn in respect of the last instance, to which I will refer later. A magistrate is, therefore, in the same position as a judge in the exercise of the powers conferred respectively by ss 173(f), 180 and 190, the relevant wording of all three provisions being identical.
>
> One is quite familiar with the course often adopted by counsel for the defence at the close of the case for the prosecution (particularly in a trial with a jury), when he submits that he has no case to answer, or in other words, that the prosecution has failed to make out a prima facie case against the accused and it is submitted that accused should not be called on for his defence.
>
> It is then that it is the duty of the magistrate or judge to consider the evidence already led and decide whether or not to call on the accused for his defence, and the question arises what is a prima facie case? In *Mozley and Whiteley's Law Dictionary* (5th Ed) it states:
>
> > 'A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.'
>
> This follows very closely the actual wording of the sections referred to but it does not follow, in my opinion, that the magistrate or judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the prima facie case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no

prima facie case has been made out and the accused should not be called on for his defence. A

In *PP v Lim Teong Seng & Ors* [1946] MLJ 108, the main issue for determination before Laville J was whether it was correct for the crown counsel to submit that if there is any reasonable evidence offered by the prosecution, the court ought to hear the defence, notwithstanding that there is doubt as to the identity of the accused. Laville J said at pp 109–110: B

> However that may be, the real point at issue in this case is whether the three accused men were part of the body of Chinese who entered Shariff's house. The only evidence as to their identity is that of Wok bte Talib, who asserts she was attacked and mishandled by them. All of them she says, and there seems no reason to doubt it, were known to her before. But against this identification are the following facts. It was not till some time in December 1945, that is three months after the event that she named the three accused as guilty parties. She had ample opportunity to take the natural course and state immediately after the assault that three of the men concerned were the accused known to her of old; she states that she did not do this because during those three months there was fear of the Chinese at Kluang among the Malays there. Even if that was so, the people to whom she went for refuge were Malayans, people of her own race, and one of them, a man having some official authority, the ketua kampong, and yet to neither of these two men, nor to her daughter did she reveal that she knew the three men who assaulted her by name; it is clear that on the night of the 23rd and on the 24th, though weak, she was conscious and could and did relate what had occurred and it is my view incredible that in doing so, she did not give the names of the accused who had injured her and her husband severely; it seems to me that as a reasonable man I must hold that the only reason for not doing so, was that she did not then recognize any of the attackers as the accused men she knew. Even if she was afraid of the Chinese I cannot see what she had to fear from confiding the names at once to Kasidan, Ahmad and her daughter, who were of her own race and presumably had as much to fear from the Chinese. C D E F
>
> In view of these considerations, I am of the opinion that no case has been made out by the prosecution which if unrebutted would warrant a conviction and, as in duty bound, I must acquit all the accused on the charge. G

It is clear that Laville J was dealing with a case where the identity of the accused was in doubt, and as such whatever has been said by the learned judge about proof beyond reasonable doubt, should be construed in this context. The identity of the accused is obviously an essential ingredient in any criminal charge to establish both the actus reus and mens rea. The failure to establish the identity of the accused would naturally leave the defence with nothing to answer. Thus, where there is a doubt as to the identity of the accused at the close of case for the prosecution, there can hardly be a prima facie case as required by s 180. In our view, *Lim Teong Seng* case cannot be construed as a real departure from *Chin Yoke*. On the contrary, it supports the principle that requires beyond reasonable doubt evidence on the essential ingredients of the charge for the purpose of establishing a prima facie case under s 180. H I

Similarly, in *PP v R Balasubramaniam* [1948] MLJ 119 which incidentally made no reference at all in either *PP v Lee Yee Heng* or *PP v Chin Yoke*, Callow J wrongly, in our view, construed *PP v Lim Teong Seng* for the proposition that at the close of case for the prosecution, the court must consider even if a prima facie case is shown, whether all elements of doubt are sufficiently removed to sustain a conviction if no more evidence is adduced. If the prosecution evidence is insufficient, how could there be a prima facie case?

Again, *PP v R Balasubramaniam* [1948] MLJ 119, which heavily relied on *Lim Teong Seng*, ought not to be construed as laying down a different judicial opinion as to the meaning of a prima facie case. What constitutes a prima facie case has been judicially defined starting with *Mozley and Whiteley's Law Dictionary* (5th Ed), which was quoted with approval by Gordon-Smith Ag JA in *PP v Chin Yoke* [1940] MLJ 47 at p 48 which states:

> A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

As distinct from a prima facie case, *Sarkar on Evidence* at p 45 defines 'prima facie evidence' as 'evidence which, if accepted appears to be sufficient to establish a fact, unless rebutted by acceptable evidence to the contrary. It is not conclusive'.

'Prima facie', means on the face of it or at first glance. So, '*a prima facie case*' is a '*case which is sufficient to call for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive*' (see the *Oxford Companion to Law* at p 987). 'Prima facie evidence' is evidence where '*a party's evidence in support of any issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence*' (see *Cross on Evidence* (2nd Ed) at pp 24 and 25; and also per Wee Chong Jin CJ in *Gan Soo Swee & Anor v Ramoo* [1969] 1 MLJ 59 at p 61). In our view, under s 180, a prima facie case is one which is established by sufficient beyond reasonable doubt evidence and can be overthrown only by rebutting evidence adduced by the other side, so as to cast a reasonable doubt on the prosecution case as to the guilt of the accused.

It is to be observed that in *Balasubramaniam*, the accused was charged for falsification of an account book, an offence under s 477 of the Penal Code (FMS Cap 45). At the close of the case for the prosecution, Callow J found an essential ingredient of the charge, namely, proof of wilful intent had not been proved, even on a prima facie basis at the close of the case for the prosecution. There was only evidence that the account book was incorrect, ill-kept or misleading, which was clearly not sufficient by itself to prove wilful fraud. The learned judge held that there must be conscious determination to defraud as distinguished from ignorant incompetency. In the concluding paragraph of his judgment, Callow J said at p 122:

> Lack of supervision and check in the Mentakab Hospital has been shown; incompetency and inefficiency by the accused is apparent, but on the evidence before me, I cannot be sure whether the accused in 1946 deliberately falsified the book P5, or simply muddled it. Did he then later try and adjust his figures, and even so failed in arithmetic? Had there been any evidence of mala fide dealings with the bedsheets, the case would have assumed a different aspect. I am by no means convinced of the innocence of the accused, of which he might have satisfied me had he elected to continue, but I do not find a case by the prosecution which if unrebutted would warrant a conviction, and I am bound in law to acquit the accused of the charge.

It is, therefore, clear that Callow J had applied the crucial words '*if unrebutted would warrant his conviction*' as a prima facie case requirement for the purpose of ss 173(f) and 180. As there was nothing for the accused to rebut, the prosecution could not be said to have established a prima facie case.

In *Wong Yiap Long & Anor v PP* [1955] MLJ 132, the accused was charged under the Betting Ordinance 1953, and although the evidence was incomplete at the end of the prosecution case, the court nevertheless called the accused for the defence. In allowing the appeal, Abbot J had this to say at p 133:

> The only point for determination is as to whether or not the prosecution had made out a prima facie case before the defence was called upon. Before the prosecution closed its case, the senior police officer merely stated that he led the raid acting upon information which had been given to him by some person, orally in the street. Sections 12, 13 and 14 empower the search of premises and the granting of search warrants by magistrates, justices of the peace and senior police officers. Section 14(1)(d) enables premises to be searched without reducing an informer's information to writing where the object of the search would be defeated by the delay. The senior police officer himself did not testify as to whether or not such delay would have defeated the ends of justice, nor did he give any reason as to why the information had not been reduced to writing. At the close of the prosecution case, therefore, the evidence was incomplete and no prima facie case had been made out. The appeal must, therefore, be allowed.

Notwithstanding any differences of opinion on the meaning of prima facie case, none of the authorities has advocated that s 180 requires the prosecution to prove a beyond reasonable doubt case. Common to all these cases is the fact that before a prima facie case can be said to be established, there must be sufficient evidence to establish every legal ingredient of the charge against the accused, such as his identity and identity of the offensive exhibits. The evidence against the accused on the essential ingredients of the charge must be free from any reasonable doubt. The general burden of proof beyond reasonable doubt on the guilt of the accused is always on the prosecution and it will never shift. But a finding that a prima facie case has been made out under ss 173(f) and 180 is a particular burden imposed by statute that on the evidence as it stands the accused would lawfully and not ought to be convicted of the offence charged. The question whether he ought to be found guilty and convicted

must be postponed until the conclusion of the trial, and it depends upon the court being satisfied beyond reasonable doubt on the whole evidence before it that the defendant is guilty. In *PP v Saimin & Ors* [1971] 2 MLJ 16 at p 17, Sharma J put the matter in this way:

> The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution, it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.
>
> As the learned magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower courts that evidence discloses a prima facie case when it is such that *if uncontradicted* and *if believed* it will be sufficient to prove the case against the accused.

In *Saimin*'s case, it is pertinent to note that the magistrate's defective reasoning for calling the accused to enter his defence was as follows:

> I am making this ruling (on prima facie case) not because I am satisfied with the case of the prosecution but because I want the accused to explain for themselves.

Clearly, the reason given by the magistrate was wrong in law as it had the effect of imposing a burden on the accused to establish his innocence. In any event, the evidence before the magistrate could not possibly constitute a prima facie case as required by s 173(f). To satisfy the statutory requirement there has to be sufficient evidence on the basis of maximum evaluation of the prosecution evidence as tested in cross-examination on the essential ingredients of the charge preferred against the accused. The prima facie case is a statutory requirement which cannot be ignored. If the case required to be established by the prosecution under s 180 is a '*beyond reasonable doubt case*', then the words '*if unrebutted*' and '*would warrant his conviction*', would become meaningless and redundant. To avoid breaching the principle of interpretation against redundancy of legislative words, the only reasonable interpretation as consistently interpreted by the courts in the past is that s 180 requires 'a prima facie case' to be established by the prosecution before the accused could be called to enter his defence.

There is clearly a distinction on the duty of the prosecution, at the close of its case under s 180 of the Code, and at the conclusion of the trial. The statutory burden under s 180 is for the prosecution to establish a prima facie case before the defence is called; whereas the common law burden at the conclusion of a trial for the prosecution is to prove the guilt of the accused beyond reasonable doubt as contained in the judgment of Spencer Wilkinson J in the case of *Mah Kok Cheong v R* [1953] MLJ 46 at p 47:

> But whatever may be the defence to a criminal charge the sole question which a subordinate court has to ask itself *at the conclusion of the trial* is — Does the defence raise a reasonable doubt as to the truth of the prosecution

> case or as to the accused's guilt? I say 'the sole question' advisedly because in this country the accused will not have been called on for a defence at all unless the prosecution have first *proved a case*. In this respect, our criminal procedure differs from that in England and this difference makes it necessary to apply with caution the English decisions which almost all deal with trials by jury. (Emphasis added.)

What is the nature of the 'case' *to be proved*, referred to by Spencer Wilkinson J? From a line of authorities already referred to, in particular *PP v Chin Yoke*, it is clearly a prima facie case imposed by s 180, ie a case 'which if unrebutted would warrant his conviction'. It is different from the sole question to be asked at the conclusion of the trial.

From the case of *Mah Kok Cheong* and other local authorities, there is clearly no legal requirement for the court to decide on the guilt of the accused at the close of the prosecution. Only the test under s 180 needs to be applied. If the accused elects to remain silent and call no evidence after defence is called, then at the conclusion of the trial, there is a duty on the part of the court to consider the evidence as a whole as a separate exercise on the guilt of the accused on the beyond reasonable doubt test, ie '*Does the defence raise a reasonable doubt as to the truth of the prosecution case or as to the accused's guilt*?'

We are not persuaded by Mr Karpal Singh's argument that the learned judicial commissioner in this appeal has erred in law for failing to comply with the ratio in *Khoo Hi Chiang*. In our view, there is no definitive ruling in *Khoo Hi Chiang* that the word 'case' in s 180 is not a prima facie case.

Before calling for the appellant to enter his defence, apart from stating that the evidence of prosecution witnesses was credible and there was sufficient evidence to call for the defence, the learned judicial commissioner also relied generally on *Haw Tua Tau* and *Ragunathan*. Now, is that a misdirection in law which merits our interference? We do not think so.

Both counsel before us have correctly referred to p 290 in the judgment of *Khoo Hi Chiang* [1994] 1 MLJ 265 as suggesting the serious change or alteration in the interpretation of s 180:

> Consequently, the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible — the *Haw Tua Tau* test — but a *maximum* evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.

As far as we are able to gather, the interpretation of the word 'case' referred to in s 180 only appears in *Khoo Hi Chiang* from pp 285–286 as an obiter dicta whilst the court was dealing with the principal issue of maximum evaluation of the evidence. Thus, after dealing with the principal issue at length commencing at p 278, the judgment took a short break at p 285 with the following observation:

A Before proceeding to consider the Privy Council case of *Haw Tua Tau* [1981] 2 MLJ 265, we would make the preliminary observation that the expression 'a prima facie case' is nowhere to be found in the Code.

Now, what is meant by the expression 'prima facie case'?

That phrase is not self-explanatory and indeed is ambiguous. What is
B it that the case shows prima facie or at first sight?

Nevertheless, the expression 'prima facie case' has been regularly used by our courts; see, for example, *PP v Lee Yee Heng* ([1938] MLJ 117 per Cussen J at p 118); *Chin Yoke v PP* ([1940] MLJ 47 per Gordon-Smith Ag JA at p 49); *PP v R Balasubramaniam* ([1948] MLJ 119 per Callow J at p 120); *Wong Yiap Long & Anor v PP* ([1955] MLJ 122 per Abbott J at
C p 133) and *PP v Saimin & Ors* ([1971] 2 MLJ 16 per Sharma J at p 17). A reading of the judgments in these cases suggests that there is a difference of judicial opinion as to what constitutes a prima facie case.

More particularly, in *R Balasubramaniam*, Callow J drew a sharp distinction between a prima facie case and a case beyond reasonable doubt whereas neither Gordon Smith Ag JA in *Chin Yoke* nor Sharma J in *Saimin*
D did anything of the sort and, indeed, they both seemed to combine the two concepts. Of the two views, that of Gordon Smith Ag JA and Sharma J, that of Gordon Smith Ag JA, with respect, seems to us much clearer as his view is that if, after weighing up the evidence for the prosecution, the court is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no prima facie case has been made out and the accused
E should not be called upon for his defence.

After this, the Supreme Court dealt with *Haw Tua Tau*'s case until the ratio of the judgment was reached at p 290 as quoted earlier on the need for maximum evaluation as opposed to minimal evaluation of the evidence.

As far as it is relevant to this appeal, it seems clear that the only ratio
F in the Supreme Court judgment is on the requirement of maximum evaluation of the evidence at the close of the case for the prosecution. We are of the view that that is the crux of the principle laid down in *Khoo Hi Chiang*. The Supreme Court's disagreement with the Privy Council's alleged advocacy of the '*minimal evaluation*' was grounded on the fact that
G firstly, Lord Diplock did not appreciate the difference between jury trial in England and Singapore and a trial before a single judge in this country; and secondly, in any event, Lord Diplock was dealing with a criminal trial in Singapore, under the amended Criminal Procedure Code, which has no application in our court.

Apart from the question of evaluation of the evidence for the purpose
H of s 180, we are unable to accept any suggestion by counsel that *Khoo Hi Chiang* has made any other binding pronouncement which can be said to have replaced the prima facie case test imposed by s 180. As stated earlier on, there is only a passing observation on the apparent difference in judicial opinion as to what constitutes a prima facie case in s 180. There
I is no serious discussion on the interpretation of s 180 as to why the 'case' which the prosecution is required to establish must be changed from 'a prima facie case' to 'a beyond reasonable doubt case'. As is normal in any obiter dicta, the Supreme Court has deliberately and correctly declined to give any new interpretation to the crucial words 'if unrebutted' and the word 'would' in both sections of the Code, which have consistently over

the years been interpreted by our courts as no more than a prima facie requirement notwithstanding any distinction between jury and non-jury trials.

In our view, the difficulty encountered by both Mr Karpal Singh and Mr Stanley Augustin in *Khoo Hi Chiang* lies in extracting the ratio from the judgment of the Supreme Court particularly at p 290 which has (inadvertently perhaps) rolled up two distinct and totally separate questions arising in criminal trials in a single sentence. The first part of the sentence on the need for maximum evaluation of the evidence is clearly the ratio of the judgment, whilst the second limb which is founded on the purpose or object of the maximum evaluation has been incorporated as obiter on the basis of mere observation. In any event, in our respectful view, at p 290, Edgar Joseph Jr SCJ was only dealing with the establishment of the 'charge' by the maximum evaluation evidence, and not the establishment of the 'case' under s 180. In our respectful opinion, the Supreme Court would have been more specific if the intention was to alter or ignore the prima facie meaning of s 180 which has long been embedded in our criminal justice system, at least as early as *PP v Goo Kian* [1939] MLJ 291 when Raja Musa J dealt with the subject.

We are, therefore, of the opinion that the court below is only bound by the ratio of *Khoo Hi Chiang* that at the close of the case for the prosecution, the duty of the court is to carry out a maximum evaluation of the evidence which, according to *PP v Chin Yoke* [1940] MLJ 47 and followed in *Munusamy v PP* [1987] 1 MLJ 492 at pp 497–498, necessarily means that the court must consider the whole evidence of the prosecution as tested in the cross-examination, on the essential ingredients of the charge.

In our opinion, s 180 of the Code is extremely crucial in our adversarial system of criminal justice, as it entitles the accused to an acquittal at the close of the case for the prosecution, instead of at the usual time, which is at the end of the trial, when both parties have presented their respective cases. The question which the court must ask itself at the close of the prosecution case, is one of law imposed by the section. Although the general burden of proof that the accused is guilty beyond reasonable doubt is on the prosecution throughout the trial and it never shifts, the requirement of a prima facie case imposed by s 180 at the close of the prosecution cannot be ignored as a matter of statutory requirement. At the end of the trial, there is no duty on the defence to convince the court that he is innocent. All he needs to do to entitle him to an acquittal is to raise or cast a reasonable doubt in the prosecution case based on the whole evidence. He may of course be entitled to an acquittal at the close of case of the prosecution, if there is no prima facie case established against him.

The word 'would' under s 180 should not be interpreted in isolation. As stated earlier on, what is important as a matter of interpretation, is to interpret the nature of the case '*which if unrebutted would warrant his conviction*'. In our respectful view, the phrase obviously refers to a prima facie case and not a beyond reasonable doubt case. Under our adversarial system of criminal justice, it would be intolerable if the trial court were required to find the accused actually guilty beyond reasonable doubt twice

— once at the close of prosecution case and again at the conclusion of the trial — before there can be a conviction. Further, what chance would the accused have to earn an acquittal at the conclusion of the trial if the court were obliged to decide at the close of prosecution that he was already guilty of the charge beyond any reasonable doubt?

The word 'would' has been defined in the *Shorter Oxford Dictionary* to mean, '*The feeling or expression of a conditional or undecided desire or intention*'. There is, therefore, a conditional or undecided element in the phrase '*if unrebutted would warrant his conviction*'. We see no justification in law in the court replacing the word '*would*' with '*ought*' or with any other word not used by the legislature. The word '*would*' in the phrase '*if unrebutted would warrant his conviction*' read in the context of s 180 clearly imports a conditional or undecided element in the conviction of the accused. In short, the court needs only be satisfied if a prima facie case has been established before calling for the accused to enter his defence.

Having said all that, we can hardly see any objection to the interpretation of the word '*would*' as meaning '*could*' as distinguished from '*ought*'. If there is any distinction between '*would warrant his conviction*' and '*could warrant his conviction*', it is one without a difference. In either case, the prima facie requirement of s 180 is not affected in view of the words '*if unrebutted*'. As such there appears to be no difference, notwithstanding s 180, between our position and Australia, where on the authority of *May v O'Sullivan* the question of law to be decided at the close of the case for the prosecution, when a submission of 'no case to answer' is made, 'is not whether on the evidence as it stands, the defendant *ought* to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted'. Indeed, the learned deputy public prosecutor's submission quoted earlier on supports this test as distinguished from the test at the conclusion of the trial when he stated, '... that the court has to give maximum consideration to the prosecution evidence to decide whether the evidence adduced thus far is sufficient upon which the accused *can* be found guilty ...'.

In our opinion, the learned judicial commissioner had, in accordance with s 180, correctly applied the prima facie case test when he held that he believed the evidence of the prosecution witnesses and that there was sufficient evidence for him to call for the defence. On the proven factual situation of the case, we are also satisfied that he must have carried out the maximum evaluation of the evidence when he concluded that he believed the testimony of the witnesses called by the prosecution. In the circumstances, we are of the view that the learned judicial commissioner did in effect decide that there was a prima facie case and as such did not err in law when he called the appellant to enter his defence. On the evidence before him together with the statutory presumptions under the Act, there was clearly a prima facie case to answer.

The first two grounds of appeal must therefore fail.

As regards the other grounds of appeal, we must now consider the defence. There is no dispute in this case that apart from the 25.84g of heroin found in the room, the police raiding party recovered other exhibits

in the room which relate to counterfeiting of identity cards. In our view, the learned judicial commissioner was entitled to reject the accused's explanation that of the three keys to the room, two were given to unnamed friends, while his own key was found missing 'three hours before the police party came to search his room'. In our view, the learned judicial commissioner was justified to conclude from the evidence that the appellant was indeed in possession of the heroin found in his small room which he was solely occupying at the material time.

At the end of the judgment, the learned judicial commissioner had this to say:

> The court found that the accused had failed to rebut the presumptions under ss 37(b), 37(da) and 37(g) of the Act. The court was satisfied that the accused had custody and control of the two packages, P2 and P3, containing heroin which was found in his room. He had possession of the heroin seized. Since he had possession of more than 15g of heroin, he is deemed to be a trafficker under the law. The accused had failed to rebut this presumption.
>
> Having considered all evidence adduced by the defence, I am satisfied not only that the defence case was not true but the accused had failed to create a reasonable doubt in my mind as to his guilt. (See *Mohamed Radhi v PP* [1991] 3 MLJ 169.)

After carefully perusing the appeal record, we are of the view that the learned judicial commissioner had fallen short of considering whether the presumption of trafficking under s 37(da) of the Act had been rebutted on the balance of probabilities in the evidence, ie whether he was trafficking at the material time or whether he was in fact forging documents. Our task is made easier when Mr Stanley Augustin conceded before us that the appellant ought to be convicted of possession of the heroin rather than that of trafficking. We agree with the concession made that the learned judicial commissioner erred in law in not sufficiently directing his mind as to the reason why in the face of the undisputed evidence the accused had failed to rebut the presumption of trafficking, in accordance with the principle laid down in *Mohamed Radhi bin Yaacob v PP*.

We would, accordingly, reduce the conviction from trafficking to one of possession under ss 12 and 39A of the Act, and set aside the death sentence. We shall now hear Mr Karpal Singh and Mr Augustin on sentence.

From submissions made, we take into account that the appellant has no previous record and has been in custody since the date of his arrest. As the offence of possession of heroin under s 12 was committed on 21 October 1985, ie before the amendment Act A659/1986 which came into force on 1 January 1987 in respect of increased penalties provided under s 39A, we sentence the appellant to 14 years' imprisonment from the date of his arrest and to six strokes of whipping.

Order accordingly.

Reported by Prof Ahmad Ibrahim